An Coimisiún Imscrúdúcháin
(Corparáid na hÉireann um Réiteach Bainc)

Commission of Investigation
(Irish Bank Resolution Corporation)

The Hon. Mr. Justice Brian Cregan
Sole Member

In the Matter of the
Commissions of Investigation Act 2004

and

In the Matter of the
Commission of Investigation into
Irish Bank Resolution Corporation

and

In the Matter of
Documents over which a duty of confidentiality and a claim of legal professional privilege are asserted by the Special Liquidators of IBRC

Determination 1 of the Commission (pursuant to section 21(2) of the Commissions of Investigation Act 2004) on assertions of a duty of confidentiality and legal professional privilege over certain documents

Dated the 5th day of November 2015

Contents

1. Introduction

1.1. The Commission of Investigation into Irish Bank Resolution Corporation (the "Commission") issued a number of statutory Directions to the Joint Special Liquidators of Irish Bank Resolution Corporation ("IBRC") (the "Special Liquidators") which required the Special Liquidators to furnish certain information and documentation to the Commission. The Commission issued such Directions as it required the information and documentation from IBRC in order to gather evidence to permit the Commission to carry out its investigation.

1.2. In response to the statutory Directions from the Commission, the Special Liquidators claimed an entitlement to refuse to disclose to the Commission the information and documentation sought on the grounds that they owe a duty of confidentiality to the customers and former customers of IBRC and on the grounds that some of the documentation sought contains privileged legal advice (pursuant to the provisions of section 21(1) of the Commissions of Investigation Act 2004 (the "Act")).

1.3. In order for the Commission to determine whether the Special Liquidators are entitled under a rule of law to refuse to disclose information and documentation required in the course of the Commission's investigation, the Special Liquidators furnished certain documentation and information to the Commission with the qualification that the documentation and information were not furnished to the Commission for admission into evidence but rather strictly for the purpose of compliance with the Directions issued by the Commission in order that the Commission could assess the claim of a duty of confidentiality and the claim of legal advice privilege made by the Special Liquidators.

1.4. The Special Liquidators furnished documents and information to the Commission by 30th September 2015 in respect of 38 relevant transactions identified by the Special Liquidators as falling within the Commission's Terms of Reference.

1.5. The Commission then requested various parties – the Special Liquidators, the Department of Finance and the former directors of IBRC – to furnish legal submissions to the Commission in respect of the Special Liquidators' claims of

privilege and confidentiality. These submissions were then circulated to all parties and supplemental submissions were invited. Final submissions were received on 16th October 2015 by the Commission.

1.6. This decision is a determination of the Commission pursuant to section 21(2) of the Commissions of Investigation Act 2004. This Determination considers whether these claims to confidentiality and/or privilege apply to such documents and/or information.

2. Background – Correspondence with Special Liquidators

2.1. On 22nd July 2015 and 31st July 2015 the Commission had meetings with the Special Liquidators and their legal advisors in order to review the nature and scope of the documents relevant to the work of the Commission held by IBRC.

2.2. On 7th August 2015 the Commission wrote to the Special Liquidators seeking voluntary disclosure of various categories of documents pursuant to the provisions of section 10(2) of the Act. In particular, the Commission sought the following information in respect of the transactions, activities and management decisions captured by Paragraph 1(a) of the Terms of Reference:

(i) A comprehensive list (in descending order of losses) of all transactions, activities and management decisions captured by Paragraph 1(a) of the Terms of Reference;

(ii) A witness statement in relation to each of the transactions, activities and management decisions set out in this schedule of transactions; and

(iii) Copies of all relevant core documents pertaining to each transaction.

2.3. By letter dated 12th August 2015 the Special Liquidators, through their legal advisors, stated they were not in a position to voluntarily hand over any documentation or information to the Commission in the absence of a Direction pursuant to section 16 of the Commission of Investigation Act 2004.

2.4. A letter of clarification was sent by the Commission to the Special Liquidators on 13th August 2015 and a reply to this letter was received on 17th August 2015.

2.5. On 24th August 2015 the Commission issued draft Directions 1, 2 and 3 to the Special Liquidators in order to provide them with an opportunity to make observations on the time period within which they could comply. By letter dated 26th August 2015 the Special Liquidators, through their legal advisors, responded and the Commission subsequently issued Directions 1 and 2 taking into account the realistic time frames suggested. In advance of issuing all final Directions to the Special Liquidators, the Commission either issued draft Directions or requested observations from the Special

Liquidators through meetings and correspondence in order to ensure that compliance with the time frames suggested were realistic and/or manageable.

Direction 1 – Schedule of Transactions

2.6. On 27th August 2015 the Commission issued its first Direction to the Special Liquidators. This Direction required the Special Liquidators to provide to the Commission a Schedule (in descending order) of all transactions, activities and management decisions which resulted in a capital loss to IBRC of at least €10m during the relevant period by 28th August 2015.

Direction 2 – Statements of Facts and Core Documents

2.7. On 27th August 2015 the Commission also issued a second Direction to the Special Liquidators requiring them to provide a written statement of facts in relation to each transaction and all core documents relating to each transaction. The statement of facts and booklet of core documents relating to the first 15 transactions were to be furnished to the Commission on or before 31st August 2015; the statement of facts and booklet of core documents relating to the remainder of the transactions were to be furnished to the Commission on or before 30th September 2015.

2.8. On 28th August 2015, in compliance with Direction 1, the Special Liquidators furnished a Schedule of the relevant transactions to the Commission (the "Schedule").

2.9. However, in a covering letter accompanying the Schedule, Messrs A&L Goodbody stated on behalf of the Special Liquidators (*inter alia*):

> "*Please note that the schedule being provided in compliance with the Direction issued by the Commission comprises confidential information arising from the banker and customer relationship between the borrowers in question and IBRC. IBRC therefore asserts confidentiality over the contents of the schedule pursuant to Section 21 of the Commissions of Investigation Act 2004."*

2.10. On 1st September 2015 the Special Liquidators provided witness statements and core documents in relation to the first 11 transactions and indicated that the remaining witness statements and core documents were in the process of being completed and would be sent to the Commission as soon as possible.

2.11. On 4th September 2015, the Special Liquidators, through their solicitors, furnished the balance of the witness statements and core documents in respect of the first 15 transactions on the schedule of transactions.

2.12. Each witness statement in respect of each transaction was a witness statement of Mr. Kieran Wallace, one of the Special Liquidators to IBRC and each witness statement followed an identical format. The first eight paragraphs of each witness statement asserted a duty of confidentiality over all of the information and documentation contained within the witness statement and/or referred to in the witness statement and also asserted privilege over certain documents. Thus, for example, at paragraphs 5, 6 and 8 of each witness statement, Mr. Wallace states as follows:

> *"5. I say that this Witness Statement is therefore provided to the Commission pursuant to the Direction made by the Sole Member under Section 16 of the Act in respect of [ ], a former borrower of IBRC. Appended to this Witness Statement are documents pertaining to the transaction involving [ ] and which is identified in the schedule and which resulted in a capital loss to IBRC of at least €10million during the Relevant Period. I say that all information and documentation contained in this Witness Statement and in the core documentation appended to the Witness Statement are confidential and IBRC hereby asserts confidentiality pursuant to Section 21 of the Act. I say that the facts and information and documentation all arise from the relationship of banker and customer which existed between [ ] and IBRC.*
>
> *6. I also say that certain parts of the documentation provided with this Witness Statement are the subject of a claim of legal privilege by IBRC. I*

say that IBRC is claiming absolute privilege in respect of any legal advice obtained in respect of the transactions set out in the Schedule.

...

8. The documentation provided with the Witness Statement is provided under compulsion pursuant to Section 16 of the Act and strictly for the purposes of compliance with the Directions and so that the Commission can assess the claims of confidentiality and privilege made by the Special Liquidators under Section 21 of the Act. I say and am advised that the Special Liquidators are not furnishing these documents to the Commission for admission into evidence in the Commission's investigation. The Special Liquidators are relying on the terms of Section 21 of the Act in this regard."

2.13. In addition to the solicitor's covering letters (which asserted a duty of confidentiality over the information) and in addition to the introductory paragraphs to each witness statement in respect of each transaction (which also asserted a duty of confidentiality over all information and documents in the witness statements and core documents), Mr. Wallace swore an affidavit on 11th September 2015 asserting confidentiality over the information and documents.

2.14. At Paragraph 12 of this affidavit Mr. Wallace states as follows:

"The Special Liquidators have furnished the documents to the Commission under compulsion pursuant to Section 16 of the Act but strictly for the purposes of compliance with the Directions and so that the Commission can assess the claims of confidentiality and privilege made by the Special Liquidators under Section 21 of the Act. I say and am advised that the Special Liquidators have not furnished the documents to the Commission for admission into evidence in the Commission's investigation. In that regard, the Special Liquidators are reliant upon the terms of section 21 (8) and (9) of the Act which provide ... [the affidavit then sets out these provisions of the Statute]*."*

2.15. There were certain production difficulties with the documents but by 21st September 2015 the Commission had received final copies of the core books for the first 15 transactions indexed and paginated.

2.16. Subsequently by 1st October 2015, the Commission received the witness statements and core documents in respect of transactions numbered 16 to 38.

Direction 3 – Siteserv Plc

2.17. Subsequently, the Commission, on 28th September 2015, issued a third Direction. This Direction required the Special Liquidators to furnish to the Commission all documents in their possession or power relating to Siteserv Plc ("Siteserv") during the Relevant Period.

Direction 4 – Minutes and other documents

2.18. In its fourth Direction issued on 28th September 2015, the Commission required the Special Liquidators to furnish the following categories of documents:

(i) The complete minutes of all IBRC Board meetings which took place between 21st January 2009 and 7th February 2013;
(ii) The complete minutes of all IBRC Credit Committee meetings which took place between 21st January 2009 and 7th February 2013;
(iii) The complete minutes of all IBRC General Executive Committee meetings which took place between 21st January 2009 and 7th February 2013;
(iv) All Framework Agreements, protocols, policies, procedures or other like documents which governed the relationship between the Minister/Department of Finance and IBRC between 21st January 2009 and 7th February 2013;
(v) A Statement of Fact and core documents in relation to the issues raised by Mr. Aynsley at the Banking Inquiry in respect of a communication from the Department of Finance to the IBRC relating to the sale of an asset for €100 million less than a putative rival bid; and
(vi) A copy of the William Fry report into the conflicts of interest within IBRC and all related documents.

The Commission directed that all these documents be furnished to the Commission by 30th September 2015.

Direction 5 – Interest Rates

2.19. The fifth Direction issued by the Commission on 28th September 2015 required the Special Liquidators to furnish to the Commission a statement of facts together with all relevant documentation relating to the interest rates applicable to the first six transactions in the Direction 1 Schedule by 30th September 2015.

Direction 6 – Unredacted documents & Statement of Account

2.20. The sixth Direction issued on 14th October 2015 was a direction to the Special Liquidators to furnish to the Commission:

(i) An unredacted copy of all redacted documents that were furnished to the Commission pursuant to Direction 2;

(ii) A full running statement of account (for the Relevant Period) in respect of each of the transactions, activities and management decisions in the Direction 1 Schedule; and

(iii) All reports prepared by Grant Thornton in its capacity as the Monitoring Trustee during the Relevant Period in respect of matters relevant to the Commission's Terms of Reference.

3. Documents provided to the Commission by the Special Liquidators

3.1. Pursuant to these Directions the Special Liquidators have furnished to the Commission the following documents:

3.2. **Documents furnished pursuant to Direction 1:**

The Special Liquidators have furnished a Schedule of 38 transactions which resulted in a capital loss to IBRC of at least €10m during the Relevant Period. This schedule runs to 4 pages. The Special Liquidators have asserted a duty of confidentiality over this document.

3.3. **Documents furnished pursuant to Direction 2:**

The Special Liquidators have furnished to the Commission:

(i) 36 written statements in relation to each of the 38 transactions;
(ii) 36 booklets of core documents in relation to each of the transactions.

This amounted to a total number of 48 lever-arch files in respect of all the transactions. The Special Liquidators have asserted a duty of confidentiality over all these documents.

Notwithstanding that the Commission was furnished with a Schedule of 38 transactions, transactions number 3 and 23 are related, as are transactions number 9 and 10. Only one witness statement and one book of core documents was furnished in respect of each related transaction. As a result, the Commission was furnished with 36 witness statement and 36 booklets of core documents for the 38 transactions.

3.4. **Documents furnished pursuant to Direction 3 - Siteserv:**

The Special Liquidators initially furnished four lever-arch files of documents to the Commission containing the core documents in respect of this transaction.

However, in relation to the Direction to provide all documentation in relation to Siteserv covering the Relevant Period, the Special Liquidators furnished to the Commission 276 lever-arch files of documents running to approximately 186,498 pages of documentation. The Special Liquidators have asserted a duty of confidentiality over all these documents.

3.5. **Documents furnished pursuant to Direction 4:**

In respect of Direction 4, the Special Liquidators have furnished the following documents:

(i) Board minutes – consisting of three lever-arch files containing 1,876 pages.
(ii) Credit Committee meetings – consisting of seven lever-arch files containing 4,794 pages.
(iii) Minutes of General Executive Committee meetings – consisting of one lever-arch file containing 145 pages.
(iv) Framework Agreements which govern the relationship with the Department of Finance – consisting of one booklet containing 54 pages.
(v) Statement of facts and core documents in relation to Mr. Aynsley's evidence to the Banking Inquiry – consisting of one booklet containing 5 pages.
(vi) Copy of the William Fry report – consisting of one booklet containing 127 pages.

The Special Liquidators have asserted a duty of confidentiality over all these documents.

3.6. **Documents furnished pursuant to Direction 5:**

In respect of Direction 5, the Special Liquidators furnished a statement of facts together with documents relating to the interest rate applicable to the first six transactions in the Direction 1 Schedule. The Special Liquidators furnished one lever-arch file containing 315 pages. The Special Liquidators have asserted a duty of confidentiality over all of the above documents.

3.7. **Documents furnished pursuant to Direction 6:**

In respect of Direction 6, the Special Liquidators have furnished the following documents to the Commission:

(i) Statements of account for the Relevant Period in respect of each of the transactions, activities and management decisions – consisting of one booklet containing 567 pages.

(ii) All reports prepared by Grant Thornton in its capacity as the Monitoring Trustee (during the Relevant Period) in respect of matters relevant to the Commission's Terms of Reference – consisting of one booklet containing 303 pages.

The Special Liquidators have claimed a duty of confidentiality over all of the above documents.

4. Exchange of Legal Submissions

4.1. Given these assertions of confidentiality and privilege, the Commission requested the Special Liquidators to furnish legal submissions to the Commission in support of these assertions. The Special Liquidators furnished these submissions on 21st September 2015 setting out the legal basis for their claim of banker-customer confidentiality and legal advice privilege.

4.2. The Commission, having considered these submissions, forwarded them to the former directors of IBRC and to the Department of Finance and invited these parties to furnish legal submissions in turn.

4.3. The directors furnished their legal submissions on 30th September and 1st October 2015. The Department of Finance furnished its legal submissions on 5th October 2015.

4.4. These submissions in turn were forwarded to the Special Liquidators for their observations. The Special Liquidators furnished supplemental submissions on 9th October 2015. These submissions in turn were sent on to the directors and the Department of Finance for final comments.

4.5. Final observations were furnished by the directors and the Department of Finance on Friday 16th October 2015.

4.6. The Special Liquidators submitted that all the documents were protected from disclosure by virtue of the banker-customer duty of confidentiality and/or legal advice privilege. They also submitted that the Commission had no jurisdiction under section 21 of the 2004 Act to compel IBRC to disclose the documents or to hold that the public interest in disclosure outweighed the private interest in confidentiality. As a result of these submissions it is necessary to review the applicable legal principles on this area of the law.

5. Legal Principles Applicable to the issue of Banker-Customer Confidentiality

5.1. The leading case which established and clarified the banker-customer duty of confidentiality is the English Court of Appeal decision in ***Tournier v National Provincial and Union Bank of England*** [1924] 1 KB 461.

5.2. In the Court of Appeal, Scrutton LJ held (at page 480):

> *"...I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances. This duty equally applies in certain other confidential relations, such as counsel or solicitor and client, or doctor and patient."*

5.3. Bankes LJ stated (at page 471):

> *"At the present day I think it may be asserted with confidence that the duty is the legal one arising out of contract, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification and to indicate its limits....*
>
> *In my opinion it is necessary in a case like the present to direct the jury what are the limits, and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle I think that the qualifications can be classified under four heads:*
>
> *(a)where disclosure is under compulsion by law;*
> *(b)where there is the duty to the public to disclose;*
> *(c)where the interests of the bank require disclosure;*
> *(d)where the disclosure is made by the express or implied consent of the customer.*

An instance of the first class is the duty to obey an order under the Bankers' Books Evidence Act. Many instances of the second class might be given. They may be summed up in the language of Lord Finlay in ***Weld-Blundell v Stephens*** *[1920] AC 956, where he speaks of cases where a higher duty than the private duty is involved, as where "danger to the State or public duty may supersede the duty of the agent to his principal." A simple instance of the third class is where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft. The familiar instance of the last class is where the customer authorizes a reference to his banker. It is more difficult to state what the limits of the duty are, either as to time or as to the nature of the disclosure. I certainly think that the duty does not cease the moment a customer closes his account. Information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification I have already referred to. Again the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself. A more doubtful question, but one vital to this case, is whether the confidence extends to information in reference to the customer and his affairs derived not from the customer's account but from other sources, as, for instance, from the account of another customer of the customer's bank."*

5.4. Atkins LJ in his judgment stated as follows (at page 483):

"Is there any term as to secrecy to be implied from the relation of banker and customer? I have myself no doubt that there is. Assuming that the test is rather stricter than Lord Watson would require, and is not merely what the parties, as fair and reasonable men, would presumably have agreed upon, but what the Court considers they must necessarily have agreed upon, it appears to me that some term as to secrecy must be implied. The bank find it necessary to bind their servants to secrecy; they communicate this fact to all their customers in their pass-book, and I am satisfied that if they had been asked whether they were under an obligation as to secrecy by a prospective customer, without hesitation they would say yes. The facts

in this case as to the course of business of this bank do not appear to be in any degree unusual in general banking business. I come to the conclusion that one of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to his affairs without his consent. I am confirmed in this conclusion by the admission of counsel for the bank that they do, in fact, consider themselves under a legal obligation to maintain secrecy. Such an obligation could only arise under a contractual term." (Emphasis added)

5.5. In ***Attorney General v Guardian Newspapers Ltd (No 2)*** [1990] 1 AC 109 (at page 281), Lord Goff in the House of Lords sets out the general principle regarding the duty of confidentiality (of which the banker/customer duty of confidentiality is an example) as follows:

"I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.

I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties - often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and

"confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases...".

5.6. Lord Goff then continued at page 282 of the report:

"To this broad general principle, there are three limiting principles to which I wish to refer. The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it...

The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point.

The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made "the confidant of a crime or a fraud": see ***Gartside v. Outram*** *(1857) 26 L.J.Ch. 113, 114, per Sir William Page Wood V.-C. But it is now clear that the principle extends to matters of which disclosure*

is required in the public interest: see ***Beloff v. Pressdram Ltd.*** *[1973] 1 All E.R. 241, 260, per Ungoed-Thomas J., and* ***Lion Laboratories Ltd. v. Evans*** *[1985] Q.B. 526, 550, per Griffiths L.J. It does not however follow that the public interest will in such cases require disclosure to the media, or to the public by the media. There are cases in which a more limited disclosure is all that is required...".* (Emphasis added)

5.7. In ***Price Waterhouse v BCCI Holdings (Luxemburg) SA*** [1992] BCLC 583 Millett J considered whether Price Waterhouse had a duty not to divulge confidential information and also BCCI's claim to legal professional privilege. Millett J considered the arguments in favour of disclosure of confidential information and the arguments against such disclosure and the competing public interests involved in both. He concluded that in the particular circumstances of the present case, the public interest in favour of disclosure ought to prevail. As he stated (at page 598):

"*There is also a marked public interest in the preservation of banking confidentiality. In* ***Tournier v National Provincial and Union Bank****, Bankes LJ said* [and the learned judge then set out the four qualifications in the judgment of Bankes LJ and then continued]...

Under para (b) Bankes LJ instanced cases where a higher duty than the private duty is involved, as where danger to the state of public duty may supersede the duty of the agent to his principal."

5.8. Millet J then set out the arguments in favour of disclosure and stated as follows at page 598:

"In the course of argument, two countervailing public interests in favour of disclosure have been advanced: (i) the public interest in the effective supervision of authorised banking institutions, and (ii) the public interest in ensuring that an inquiry into the adequacy of such supervision should have access to all relevant material."

5.9. Having considered that matter Millet J concluded at page 601:

"I have reached the conclusion that in the particular circumstances of the present case the public interest in favour of disclosure ought to prevail".

5.10. In ***National Irish Bank Limited v RTE*** [1998] 2 IR 465 the Irish High Court and Supreme Court considered the issues of banker/customer confidentiality and the public interest in respect of the publication of confidential information where there were allegations by RTE that customers of the bank had made investments for the purposes of tax evasion.

5.11. The plaintiffs in this case were bankers; the defendant was RTE. The plaintiffs had received a letter from RTE seeking answers to a number of questions about information which it intended to broadcast. The plaintiffs issued proceedings and sought an interlocutory injunction claiming that this letter from RTE indicated that the defendant had confidential information which belonged to the bank and that the publication of this information would irreparably damage the relationship of trust and confidence between the plaintiffs and their customers. The plaintiffs argued that the defendant had received no authorisation to use the information and that they were entitled to enjoin the defendant from using it in any way. The defendant claimed that the publication of the information, even if confidential, was justified on the grounds of public interest because the defendants claimed that the nature and structure of a scheme operated by the plaintiffs permitted customers to evade their tax liabilities.

5.12. Shanley J in the High Court refused the injunctive relief sought, holding that the defence had made out a strong case of over-riding public interest in the publication of this information.

5.13. Shanley J in his judgement (at pages 473 – 5) held as follows:

"In the submissions of counsel for the plaintiff and counsel for the defendant, I was referred to a significant number of authorities which are of much assistance to me and many of which are set out hereunder in my summary of the applicable legal principles.

The applicable law

(a) Where a person in whom confidential information reposes discloses that information to the detriment of the party who has confided in him, he commits the tort of breach of confidence. The law recognises that a duty of confidence will arise in circumstances where confidential information is so reposed and the courts will restrain any apprehended breach of such a duty of confidence or award damages for actual breach of that duty. To attract the duty of confidence, the information in issue must not be trivial information and must be information which is not already in the public domain. Finally, the public interest (for such it is) in the maintenance of confidences may in certain circumstances have to be balanced against the public interest favouring disclosure. While most claims for injunctions restraining disclosure of confidential information have related to commercial matters and relationships, nonetheless a range of other relationships have given rise to such claims and the law has been willing, if the circumstances of a relationship require it, to recognise the existence of an obligation of confidence and give redress for any apprehended or actual breach of confidence.

(b) It is common case that the character of confidence attaches to such of the information the defendant has which derived from the information supplied by ex-employees of the plaintiffs and which derive from documents (if any) obtained by the defendant from the plaintiffs; equally there is no dispute that there is a duty of confidence owed by the defendant to the plaintiffs; the only matter, which has in reality been at issue is whether the public interest in that confidential information remaining confidential outweighs the public interest which the defendant says exists in making known the alleged tax evasion scheme and participants...

... It seems to me that disclosure of confidential information will almost always be justified in the public interest where it is a disclosure of information as to the commission or the intended commission of serious crime because the commission of such crime is an attack upon the State

and the citizens of the State and such disclosure will always be in the public interest. While the disclosure of serious crime will always be in the public interest there is also a range of other activities (which are not necessarily criminal) the disclosure of which may also justify a breach of confidence on the grounds that its disclosure is also in the public interest. It would, I believe, be unwise to attempt to define the boundaries of the so-called exception of public interest and I refrain from doing so other than to observe (as Ungoed-Thomas J. did in ***Beloff v. Pressdram Ltd.*** *[1973] 1 All E.R. 241 at p. 260) that:- "...misdeeds of a serious nature and importance to the country..." will justify disclosure on the grounds that such disclosure is invariably in the public interest."* [Emphasis added]

5.14. On appeal by National Irish Bank, Lynch J in giving the majority decision in the Supreme Court held as follows (at page 30):

"There is no doubt but that there exists a duty and a right of confidentiality between banker and customer as also exists in many other relationships such as for example doctor and patient and lawyer and client. This duty of confidentiality extends to third parties into whose hands confidential information may come and such third parties can be injuncted to prohibit the disclosure of such confidential information. There is a public interest in the maintenance of such confidentiality for the benefit of society at large.

On the other hand there is also a public interest in defeating wrongdoing and where the publication of confidential information may be of assistance in defeating wrongdoing then the public interest in such a publication may outweigh the public interest in the maintenance of confidentiality." [Emphasis added]

5.15. Keane J (as he then was) giving a minority judgment in the Supreme Court in ***National Irish Bank v RTE*** considered the defence of public interest as an exception to the rule of banker-customer confidentiality. Keane J reviewed the development of this doctrine in the UK and stated as follows:

"The modern English authorities have proceeded on the basis that such a defence, based as it is on the public interest in the prevention of wrongdoing, extends not merely to cases of criminal or fraudulent misconduct, but also to other wrongs or misdeeds, whether already committed or in contemplation...

The English authorities indicated that the appropriate approach was for the Court to engage in a balancing exercise, described as follows by Goff LJ in Attorney General v Guardian Newspapers (No 2) [1990] 1 A.C. 109 at p. 282:-

" ...although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure"."
[Emphasis added]

5.16. The learned judge then referred to various other cases and continued as follows:

"While, as the learned trial judge noted, it would be unwise to attempt a formulation of the defence of public interest which would be applicable in every case, it can be said with confidence that the "balancing" approach suggested by the English authorities can be adopted in this jurisdiction in a case such as the present. If the plaintiffs and their customers are indeed participating in a scheme designed wholly or in part to facilitate the evasion of tax, the public interest in the maintenance of the confidentiality must be outweighed by the countervailing public interest in exposing such conduct.

The extent of the disclosure which may be permissible, however, is another matter. In ***Initial Services Ltd v Putterill*** *[1968] 1 QB 396, Denning MR. said at p. 405:-*

"The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press"." [Emphasis added].

5.17. Keane J continued (at page 486) of his judgment as follows:

"The details of the scheme are already in the public domain and are the subject of inquiries by the Revenue Commissioners and the Central Bank. The defendant has not made it clear how the broadcasting of the names of the customers and their accounts, some of whom, it accepts, may be innocent of any wrongdoing, is justified in the public interest. As has been frequently pointed out, it is not sufficient for it to say that the public would find such information interesting, as well it might: that does not make the disclosure one that is required in the public interest. On the contrary, given that there is a public interest in the maintenance of confidentiality for legitimate banking transactions, to permit the disclosure to the world at large of the names of customers and the details of their private financial affairs without notice to them, in circumstances where no illegality has been established, could not be justified.

It should be emphasised that this is not simply a question of protecting the interests of the plaintiffs, or even those of their customers involved in the scheme who may, for all one knows, be innocent of any wrongdoing. <u>The existence of an efficient banking system based on a confidential relationship between the individual banks and their customers is a central feature of a modern economy. To give to the defendant an unfettered licence to publish the names of every customer involved in the Clerical</u>

Medical Insurance scheme where it had no information in its possession in relation to the particular accounts that wrongdoing has, or will, take place would be to effect a major inroad into that confidential relationship, which is warranted neither by principle nor authority." [Emphasis added]

5.18. As is stated in ***Neate and Godfrey: Bank Confidentiality*** (sixth edition, Bloomsbury Professional) in the chapter on Ireland (at page 564):

"The Supreme Court's decision [in National Irish Bank v RTE] *was applied in* ***The Minister for Enterprise, Trade and Employment and Ansbacher (Cayman) Limited on the Application of the Revenue Commissions*** *[2004] 3 IR 193. In that case the High Court had appointed inspectors ... to investigate the affairs of Ansbacher (Cayman) Limited. The report was presented to the court and the Revenue Commissioners were permitted access to the report. The Revenue Commissioners now sought access to further documents which the inspectors had acquired in the course of their investigation but which were not included in the report. In granting the application, (although limiting it somewhat), the President of the High Court stated:*

"*In the circumstances of the present case it is appropriate to have regard to the contractual duty of confidentiality which exists between a bank and its customer and to the constitutional right to privacy and to balance these rights against the interests sought to be vindicated by the applicant for an order. However, the public interest is paramount: see National Irish Bank Limited v RTE. Limited disclosure such as disclosure of tax evasion to the Revenue Commissioners, the recipient of such disclosure having a particular interest as opposed to disclosure to the world at large, will almost inevitably result in the Court finding the balance in favour of the disclosure....*

In making such order, I must have regard to the interests of the persons affected by the order sought and in particular to their contractual right of confidence in their dealings with the bank and their constitutional right to

privacy. I must balance the interests of such persons against the public interest, in this case the effective functioning of the Revenue Commissioners. The disclosure sought is not to the public at large but is limited to the applicant who has a special interest in obtaining the same.... I am satisfied that the public interest in the assessment and collection of taxes outweighs the contractual right to confidentiality and the constitutional right to privacy of the individuals and companies mentioned in the report".

5.19. In ***Haughey v Moriarty*** [1999] 3 IR 1 the High Court (Geoghegan J) held (at page 24) that even if the plaintiffs had a constitutional right to privacy in relation to their bank accounts (and not merely a contractual right to confidentiality) these rights would have to give way to the legitimate public interest in seeking discovery of their accounts.

5.20. The Supreme Court also held that there was a fundamental personal right of each citizen to privacy which, though not expressly guaranteed in the Constitution, flowed from the Christian and democratic nature of the State. The exercise of this right was qualified and could be outweighed by the exigencies of the common good. In this case the resolutions setting up the Tribunal were justified in that, while they encroached on the plaintiff's right to privacy, they did so in order to enquire into matters deemed to be of urgent public importance and therefore in the name of the common good.

5.21. In the Supreme Court Hamilton CJ stated as follows (at page 58 of the report):

"There is no doubt but that the plaintiffs enjoy a constitutional right to privacy. What is in dispute in this case is the extent of such right to privacy and in particular whether it extends to the right to confidentiality in respect of banking transactions and whether the exigencies of the common good outweigh, in the circumstances of this case, such right to privacy...

...The right to privacy is not in issue: the issue is the extent of that right and whether that right extends to the confidentiality of a person's banking transactions.

For the purposes of this case, and not so holding, the Court is prepared to accept that the constitutional right to privacy extends to the privacy and confidentiality of a citizen's banking records and transactions. This is a right which is recognised at common law."

5.22. The learned Chief Justice then referred to the dicta of Lynch J in ***National Irish Bank v RTE*** (set out above) and continued as follows:

"Just as such public interest in defeating wrong doing may outweigh the public interest in the maintenance of confidentiality, the exigencies of the common good may outweigh the constitutional right to privacy.

The exigencies of the common good require that matters considered by both Houses of the Oireachtas to be of urgent public importance be inquired into, particularly when such inquiries are necessary to preserve the purity and integrity of our public life without which a successful democracy is impossible.

In this case both Houses of the Oireachtas deemed it expedient that a tribunal of inquiry be established to inquire into the matters set forth in the resolutions.

The effect of such resolutions is undoubtedly to encroach upon the fundamental rights of the plaintiffs in the name of the common good.

The encroachments on such rights is justified in this particular case by the exigencies of the common good.

Such encroachment must however be only to the extent necessary for the proper conduct of the inquiry.

Both Houses of the Oireachtas are entitled to assume that the Tribunal will conduct its investigation in accordance with the principles of constitutional justice and fair procedures and will only interfere with the constitutional rights of the plaintiffs when, and only to the extent that, it is necessary for the proper conduct of the inquiry."

5.23. In ***Redmond v Flood*** [1999] 3 IR 79, the applicant, Mr. Redmond, sought various reliefs by way of judicial review in relation to the investigations and actions of the Flood Tribunal. The reliefs which he sought were in relation to issues of fair procedures, the conducting of the hearing in public and the interpretation of the terms of reference of the Tribunal by the Chairman. At the *ex parte* stage seeking leave to apply for judicial review, the applicant was only granted leave to seek judicial review in relation to a limited number of the reliefs sought (i.e. those reliefs concerning fair procedures) and the applicant appealed to the Supreme Court in relation to the remainder of the matters including those concerning the interpretation by the Tribunal of its terms of reference.

5.24. The Supreme Court held that although the exceptional inquisitorial powers conferred upon a Tribunal may interfere with a citizen's constitutional right to privacy, the exigencies of the common good required that matters of urgent public importance be enquired into and this might outweigh the constitutional right to privacy.

5.25. As Hamilton CJ stated at page 88 of the decision:

"The right to privacy is however not an absolute right. The exigencies of the common good may outweigh the constitutional right to privacy.

The exigencies of the common good require that matters considered by both Houses of the Oireachtas to be of urgent public importance be inquired into, particularly when such inquiries are necessary to preserve the purity and integrity of public life.

In this case both Houses of the Oireachtas deemed it expedient that a tribunal of inquiry be established to inquire into the matters set forth in the resolutions of both Houses of the Oireachtas and the presumption of constitutionality attaches to such resolutions.

The effect of such resolutions is undoubtedly to encroach upon the fundamental rights of the applicant in the name of the common good but is justified by the exigencies of the common good. Such encroachment must however be only for the proper conduct of the inquiry."

5.26. In ***Cooper Flynn v RTE*** [2000] 3 IR 344, the plaintiff brought a libel action against RTE over allegations made in reports that she had induced certain persons to participate in a scheme aimed at evading tax. The defendants had sought, and had been granted, non party discovery of documents relating to the alleged scheme. The names of the participants in the scheme were excised. The defendants sought the disclosure of the names. The bank against which discovery had been sought argued that providing the names and addresses of customers would be a breach of the confidentiality of the bank's customers. Nevertheless, the High Court held that the names and addresses of customers should be provided even though the documents were of a confidential nature.

5.27. Kelly J, in dealing with the issue of bank confidentiality, after referring to the *dicta* of Lynch J (speaking for the majority in the Supreme Court) in ***National Irish Bank Limited v RTE*** stated as follows (at page 351):

"Although that was the judgment of the majority I do not understand the minority in the Supreme Court (Hamilton C. J. and Keane J.) as taking any different view of that aspect of the matter. It is therefore clear that a duty and right of confidentiality exists between a banker and his customer. <u>That is not to be equated with an entitlement to any form of legal privilege. The duty and right of confidentiality is not absolute and must in an appropriate case be weighed and balanced as against countervailing rights, obligations and entitlements.</u> The particular countervailing entitlement identified in the case from which I have just

cited was the public interest in defeating wrongdoing in circumstances where the publication of the confidential information might be of assistance in bringing that about. That entitlement in an appropriate case might well outweigh the public interest in the maintenance of confidentiality." [Emphasis added]

5.28. The learned High Court judge held that an inspection of the customer files in an un-redacted form which would disclose their identity to the second defendant would confer litigious advantage upon the defendants and would or might enable such person to give evidence in favour of the defendants upon their plea of justification. He stated (at page 355) that "*to deny them this entitlement would not be conducive to the fair disposition of this action*". However, the judge accepted that there was "*an undoubted duty of confidentiality*" and he therefore sought to incorporate in the order various steps to mitigate the loss of confidentiality.

5.29. Kelly J therefore concluded (at page 357): "*The obligation of confidentiality, owed by the bank to its customers, must therefore yield to the rights of the first and second defendants to a fair trial*".

5.30. In ***Caldwell v Mahon*** [2007] 3 IR 542 the applicant sought relief by way of judicial review in respect of certain rulings and decisions made and procedures adopted by the respondents in their capacity as members of the Tribunal of Inquiry into Certain Planning Matters and Payments. The Tribunal had carried out certain investigations in private and in public and proposed to carry out future public hearings. The applicant submitted that as a part owner of the lands through a limited liability company the effect of the inquiry would be to infringe the confidentiality of his business affairs and that this infringement would amount to a breach of his constitutional right to privacy and his right to privacy under the European Convention of Human Rights.

5.31. The High Court (Hanna J) held, in refusing the reliefs, that although there was a constitutional right to privacy it was not an absolute right but was subject to the exigencies of the common good. Hanna J also held that any constitutional right to privacy in business dealings, in particular dealings carried on through incorporated

companies, could only exist at the outer reaches of the core personal right to privacy. Given the distance from this core right, the needs of the common good must weigh all the more heavily against it, subject to the requirement of constitutional justice and fair procedures.

5.32. In ***Walsh v National Irish Bank Limited*** [2007] 5 JIC 0407, a case in which the Revenue Commissioners sought an order directing a bank to furnish information, McKechnie J stated as follows:

> "*There is no doubt but that it is an implied term of any contract between a banker and its customer that the former will not divulge to third parties, without the express or implied consent of the latter, the state of his account or the amount of his balance, the securities offered and held, the extent and frequency of transactions or indeed any information acquired by the bank during, or by reason of, its relationship with the customer. The seminal authority for this proposition is the case of* ***Tournier v National Prudential and Union Bank of England*** *[1924] 1 KB 461. That case has been accepted and virtually without qualification has been applied in numerous other decisions since then... That such a duty exists, whether it is based on an implied term or underpinned by public interest considerations, was recognised in this jurisdiction by the Supreme Court in National Irish Bank Limited v Radio Telefis Eireann [1998] 2 IR 465 at p. 494. Therefore there can be no doubt about the existence of this principle of law.*
>
> *This obligation of secrecy is not however absolute and must yield to certain countervailing circumstances, such as where the banker is compelled to disclose by reason of either statute law or court order, or where there is a public duty of disclosure or where it is in the bank's own interest to so disclose. These qualifications were originally set out in the Tournier's decision with the description so given in that case remaining good law to this day*". (Emphasis added).

5.33. The learned High Court judge then set out the four qualifications to the duty of confidentiality set out above in ***Tournier*** and continued:

> *"It should be noted that these qualifications are not mutually independent and that those mentioned at subparagraphs (a), (c) and (d) must give way, where the circumstances so demand, to the overriding duty of disclosure in the public interest.* ***Attorney General v. Guardian Newspapers Limited (No 2)*** *[1998] 3All E.R. 545. An example of the latter would be an attempt to uncover fraud or detect crime. See* ***Pharaon v Bank of Credit Commerce International*** *[1998] 4 All ER 455 and the judgment of Rattee J., which was one of many such judgments, arising out of what has being described as the largest bank fraud in the world's history. Where a conflict arises between the duty of confidentiality on the one hand, and a duty to disclose in the public interest on the other, the correct approach is that as set out by Kelly J. in* ***Cooper Flynn v RTE*** *[2000] 3 IR 344 where at p. 351 the learned judge stated:*
>
> *"It is therefore clear that a duty and a right of confidentiality exists between a banker and his customers. That is not to be equated with an entitlement to any form of legal privilege. The duty and right of confidentiality is not absolute and must in an appropriate case be weighted and balanced as against countervailing rights, obligations and entitlements".*
>
> *...The above principles do not address the temporal limits (if any) which apply to this duty. It could not be the case that once an account is closed the duty ceases. That would entirely undermine the commercial significance of the rule. It seems to me that once information is obtained by virtue of the parties relationship, then the same is protected unless one of the specified exceptions above mentioned can be invoked. See* ***Tournier*** *at pp 473-474 and 485. This in my view is the minimum margin which is necessary".*

5.34. The Commission has also considered the decision of McGovern J in ***Slattery v Friends First Life Assurance Company Limited*** [2013] IEHC 136. At page 42 of the decision, the learned High Court judge deals with the duty of confidentiality and refers to ***Tournier, Walsh v National Irish Bank, National Irish Bank Limited v RTE, Haughey v Moriarty, Caldwell v Mahon*** and related cases. As McGovern J stated at paragraphs 105 and 106 of his judgment:

> "*Previously, the Supreme Court in Haughey v. Moriarty [1999] 3 I.R. 1 per Hamilton CJ had tentatively recognised, while explicitly refusing to rule authoritatively on the matter, that a constitutional right to privacy may attach to business dealings, in particular bank accounts. This putative right, insofar as it was recognised, would be subject to the exigencies of the common good, and was stated in identical terms to the right of confidentiality set out in National Irish Bank Limited v. Radio Telefís Éireann, citing the decision of Lynch J.*
>
> *However, Hanna J in Caldwell v. Mahon [2007] 3 I.R. 542 correctly states, in the view of this Court, the position as being that any such right operates at the "outer reaches of and at the furthest remove from the core personal right to privacy", and thus may readily be qualified by countervailing considerations."*

5.35. In paragraphs 111 and 112 of his decision, McGovern J, having considered whether the duty of confidentiality was a duty in equity or a tort of misuse of private information or a constitutional right or indeed a right to privacy deriving from Article 8 of the European Convention of Human Rights and Fundamental Freedoms, stated as follows:

> *"While the issue of the breach of confidentiality was raised in pleadings, it was surprisingly not addressed by way of particularly detailed legal submissions. But, it is clear that the law recognises a duty of confidentiality such as would apply in this case, whether framed in contract, in tort, in equity or on a constitutional basis, and that this Court*

is possessed of the jurisdiction to award damages on foot of a breach thereof.

Insofar as it is necessary to distinguish between the various conceptual frameworks for present purposes, it is absolutely clear that a duty of confidentiality arises as an implied term in banking contracts, following Tournier, but also that a broader duty of confidentiality may arise in the terms set out by Lynch J in National Irish Bank Limited v. Radio Telefis Éireann. Even if an actionable constitutionally grounded right to privacy or confidentiality in business dealings can be said to arise, its parameters of application to the instant case appear to be no broader than those of the fiduciary duty as determined by Lynch J."

5.36. In ***McKillen v Times Newspaper Limited*** and in ***O'Brien v Times Newspaper Limited*** [2013] IEHC 150 Mac Eochaidh J in an application for an interlocutory injunction to restrain an intended publication of confidential information also considered the issue of banking confidentiality. In the course of his judgment Mr. Justice Mac Eochaidh referred to the decisions of the High Court and the Supreme Court and ***National Irish Bank v Radio Telefis Eireann*** and stated:

"*The contest in this case is between categories of competing rights. I have already identified the 'Sunday Times' interest in its own constitutional rights and the public's right in the existence of a free and untrammelled press in a democratic society. The plaintiffs, of course, naturally have an interest in protecting their own confidential dealings and it is well established that the public also has an interest in the maintenance of confidential banking relations. The interest in such confidentiality extends not only to the parties who enjoy the confidence, but every citizen and resident in the State would like to see such relationships protected."*

5.37. The learned High Court judge then noted that in a number of cases the courts were "*extraordinarily slow to place restraints on publication*" and then continued:

"*On the other hand, the courts accept the need to protect the confidential relations between banks and their customers. The principal authority addressed to this Court on circumstances when the confidential relationships may be invaded is the decision of this Court and of the Supreme Court in National Irish Bank v. Radio Telifis Éireann [1998] 2 ILRM 196.*

It is contended on behalf of the plaintiffs that the only circumstance in which confidential relations can be breached and details published is when it is intended to report upon or unearth an iniquity or misdeeds of some sort and that there is no other category recognisable by the courts which would permit an invasion of confidences."

5.38. Mr. Justice Mac Eochaidh also stated:

"On behalf of the 'Sunday Times' , what is said to me is that there is a public interest of a real and weighty nature in publishing information about the manner in which the bank in question deals with one of its most significant debtors. Such interest arises in circumstances where the bank has been bailed out by the public; the debts of the bank have been taken on the shoulders of the Irish people; the bank is run effectively at the direction of or by persons appointed by the Minister for Finance; and the whole of the operation is now, effectively, a public interest operation. In those circumstances, there is a particular public interest in knowing certain things about the relationship between the bank and its customers."

5.39. On the facts of that case Mac Eochaidh J decided to permit a limited publication of the intended information.

5.40. The Commission has also considered the case of ***O'Brien v RTE*** and ***Irish Bank Resolution Corporation Ltd (in special liquidation) v RTE*** [2015] IEHC 397 (Binchy J, 21st May 2015). In this case Mr. O'Brien sought an injunction restraining the defendant from making use of certain confidential information. This confidential information identified details of Mr. O'Brien's personal banking arrangements with

IBRC. The IBRC also sought an injunction restraining the defendant from publishing or broadcasting any information exchanged between IBRC and Mr. O'Brien in the course of their banker/customer relationship.

5.41. At paragraph 63 (and following) of his judgment, Binchy J refers to ***Tournier***, ***National Irish Bank v RTE***, ***McKillen v Times Newspapers*** and the *dicta* of Shanley J in ***National Irish Bank* v *RTE*** in the High Court. At paragraph 67 Binchy J states:

> *Like many rights however, the right* [to banking confidentiality] *is not absolute and may be displaced in certain circumstances where warranted by the public interest. Historically, it was recognised that the public interest would warrant disclosure in cases of wrongdoing or iniquity. The defendant accepted in these proceedings that there was no suggestion of any wrongdoing or iniquity, actual or contemplated, on the part of Mr. O'Brien...*
>
> *That disclosure is permissible in the public interest is not in dispute in these proceedings either, and that is hardly surprising given that there are numerous cases in which disclosure has been ordered notwithstanding the existence of a duty of confidentiality. These include: Lion Laboratories Ltd. v. Evans [1985] Q.B. 526, National Irish Bank Ltd. v. Radió Telefis Éireann [1998] 2 I.R. 465, and McKillen v. Times Newspapers Ltd. [2013] IEHC 150."*

5.42. Finally Binchy J stated in his conclusions:

> *"The defendant acknowledges the right of the plaintiffs to confidentiality in the documents and information in the possession of the defendant. The existence of a right to confidentiality as between a bank and its customers has been recognised in law for almost a century. It is not just a private interest. As Lynch J. said in National Irish Bank Ltd. v. Radió Telfis Éireann [1998] 2 I.R. 465, there is a public interest in the maintenance of such confidentiality for the benefit of society at large.*

It is also agreed by the parties that that right to confidentiality is not absolute and that in given circumstances it may give way to issues of very significant public importance, and not just in cases where wrongdoing is involved.

It seems to me however that the authorities establish there must be some meaningful connection between the issue of public importance that has been identified and firstly, those whose rights may be breached and, secondly, the information and documentation under consideration. It could hardly be suggested that information of a confidential nature could be divulged absent any such connection.

In this case the issue of significant public interest that the defendant has raised arises under the broad heading of the corporate governance of IBRC. There is no doubt at all about the public interest in the affairs of IBRC. As MacEochaidh J. said in the case of McKillen v. Times Newspapers Ltd. & Mark Tighe [2013] IEHC 150 "the bank is run effectively at the direction of or by persons appointed by the Minister for Finance; and the whole of the operation is now, effectively, a public interest operation".

That of itself however does not entitle the public to know every detail of the affairs or operation of IBRC, and certainly not confidential information concerning its customers. The public interest is in knowing that it is properly governed and operated, and where there are any significant shortcomings in this regard, and in particular where such shortcomings may lead to significant losses, which have to be borne at the expense of the public purse, in my view the public is entitled to be informed of such matters.

The concerns raised by the defendant in this case relate to the relationship between the Department, the Minister for Finance and IBRC, to the relationship between the former CEO of IBRC and a major debtor (not Mr. O'Brien) and close relationships with large clients which the Minister

considered inappropriate. One of those clients was Mr. O'Brien with whom the former CEO confirmed a strong but not inappropriate relationship. The concerns also included transactions which are alleged to have been poorly executed by IBRC, including the SiteServ transaction, with which Mr. O'Brien is connected. Except for the SiteServ transaction, none of these concerns involved Mr. O'Brien in any significant way. As to the SiteServ transaction, it has not been suggested that this is in any way related to the loan with which the information and documentation these proceedings is concerned and is not therefore of any relevance in the consideration of this application." [Emphasis added]

5.43. **Summary of the legal principles established by the case law**

5.44. In summary, what these decisions have established is that:

i) there exists a banker's duty of confidentiality to its customers;

ii) it encompasses many different categories of documents;

iii) this banker's duty of confidentiality is not unqualified and there are four qualifications or exceptions to the rule (i.e. where disclosure is under compulsion of law, where there is a duty to the public to disclose, where the interests of the bank require disclosure and/or where the disclosure is made by the express or implied consent of the customer);

iv) this duty of confidentiality does not exist solely for the benefit of the bank and the customer; there is also a public interest in maintaining banker-customer confidentiality;

v) in certain circumstances the public interest in confidentiality will be outweighed by the public interest in the disclosure of such confidential information;

vi) the Courts have balanced the public interest in disclosure against the public and private interest in confidentiality in a wide variety of cases and have held that, in many cases, the public interest in disclosure has outweighed the public and private interest in confidentiality;

vii) however, in each of those cases, the Courts have considered on a case by case basis the nature of the documents over which confidentiality is asserted and have carefully balanced the various public and private interests involved.

5.45. There is no case in which a court has had to consider section 21 of the Commissions of Investigation Act 2004.

6. Section 21 of the Commissions of Investigation Act 2004

6.1. **Section 21**

(1) *Subject to subsection (4), nothing in this Act compels—*

(a) the disclosure by any person of any information that the person would be entitled under any rule of law or enactment to refuse to disclose on the grounds of any privilege or any duty of confidentiality, or

(b) the production of any document in the person's possession or power containing such information.

(2) *Where a person claims to be entitled under any rule of law or enactment to refuse, on the grounds of any privilege or any duty of confidentiality—*

(a) to disclose any information required in the course of an investigation by a commission (including information required in response to a request made under section 14 (5) or to a question put under section 16 and information in a statement or answer that is the subject to a direction under section 16 (1)(h), or

(b) to produce any document in the person's possession or power that the person is directed under this Act to produce,

the commission may, subject to subsection (4) of this section, determine whether the privilege or the duty of confidentiality applies to that information or document.

(3) *Where the commission determines that the privilege or the duty of confidentiality relied on by a person as grounds for refusing to disclose information referred to in subsection (2)(a) does not apply to the information, the person shall disclose that information to the commission unless the determination is overturned under section 22.*

(4) *A determination may only be made under subsection (2)(b) in relation to a document if the commission has—*

(a) examined the document, and

(b) considered a written statement provided by the person concerned specifying the grounds for the claim, including the privilege or duty of confidentiality relied on.

(5) *For the purposes of subsection (4), the person concerned shall, at the commission's request—*

(a) submit the document to the commission within the period specified in the request, and

(b) unless exempted under subsection (6), provide the commission, within that period, with the written statement referred to in subsection (4)(b).

(6) *A person who has already provided the commission with an affidavit under section 16 (1)(f) specifying the basis for objecting to the production of a document need not provide a written statement under subsection (5)(b) of this section concerning the same document*.

(7) *If a person does not, within the specified period, comply with a request of a commission to submit a document for a determination under this section or to provide a written statement under subsection (5)(b)—*

(a) the chairperson of the commission or, if the commission consists of only one member, the sole member may apply to the Court for an order directing the person to comply with the request, and

(b) on the hearing of the application, the Court may make or refuse to make the order.

(8) *Where the commission determines that the privilege or the duty of confidentiality relied on as grounds for refusing to produce a document applies to any of the information in the document, the document is not considered to be evidence received by the commission, except to the extent authorised under subsection (10).*

(9) W*here the commission determines that the privilege or duty of confidentiality relied on as grounds for refusing to produce a document applies to any of the information in the document, the commission may cause to be prepared a summary version of the document that excludes that information, but only if—*

(a) the document so allows, and

(b) in the commission's opinion, it is in the interests of both the investigation and fair procedures to do so.

(10) *Where a commission causes a summary version of a document to be prepared in accordance with this section, the summary version forms part of the evidence received by the commission*.

(11) *Where the commission determines that the privilege or the duty of confidentiality relied on as grounds for refusing to produce a document does not apply to any of the information in the document, the document is considered for the purposes of this Act to have been received as evidence by the commission unless the determination is overturned under section 22.* [Emphasis added]

6.2. **Analysis of section 21**

6.3. In broad terms, section 21(1) provides that nothing in the Act compels the disclosure by any person of any information or document that a person would be entitled under any rule of law to refuse to disclose on the grounds of any privilege or any duty of confidentiality.

6.4. Section 21(2) of the 2004 Act provides that where a person claims to be entitled under any rule of law to refuse to disclose any information or to produce any document on the grounds of any duty of confidentiality or on the grounds of any privilege, then the Commission may determine whether the privilege or duty of confidentiality applies to that information or document.

6.5. Section 21(3) deals with the issue of confidential information whereas sections 21(4)-(11) deal with the issue of confidential documents.

6.6. Section 21(3) provides that where the Commission determines that the duty of confidentiality relied upon (as grounds for refusing to disclose information) does not apply to the information then the person shall disclose that information to the

Commission unless the determination is overturned by the High Court under section 22.

6.7. Subsection (4) provides that the Commission may only make a determination under section 21(2)(b) in relation to a document if the Commission has examined the document and considered a written statement provided by the person concerned specifying the grounds for the claim including the privilege or duty of confidentiality relied upon.

6.8. In the present case the Commission has considered the documents and categories of documents over which the Special Liquidators have claimed a duty of confidentiality and privilege and the Commission has considered a written statement provided by the Special Liquidators specifying the grounds for the duty of confidentiality and privilege relied upon.

6.9. Sections 21(5), (6), and (7) are of no application in the present case because the Special Liquidators have provided the written statement required under section 21(4).

6.10. Critically, section 21(8) provides that where the Commission determines that the duty of confidentiality (or privilege) relied upon as a ground for refusing to produce a document applies to any of the information then the document is not considered to be evidence received by the Commission.

6.11. Section 21(9) provides that where the Commission determines that the duty of confidentiality (and/or the privilege) applies to any of the information contained in a document, the Commission may cause to be prepared a summary version of the document that excludes that information but only if:

i. The document so allows; and
ii. In the Commission's opinion it is in the interests of both the investigation and fair procedures to do so.

6.12. Section 21(11) provides that where the Commission determines that the privilege or duty of confidentiality relied upon as grounds for refusing to produce the document

do not apply to any of the information in the document then the document is considered to have been received as evidence unless the determination is overturned by the High Court under section 22.

7. Assessment of the Claim of Confidentiality

7.1. Introduction

7.2. The Special Liquidators have asserted a duty of confidentiality over all the documents and information which they have furnished to the Commission to date.

7.3. This claim of a duty of confidentiality is not simply a claim over one or two documents. It is a claim of confidentiality over all documents, comprising approximately two hundred thousand pages, which go to the heart of the issues which the Commission was established to investigate.

7.4. Therefore, the Commission has to determine, under section 21(2) of the 2004 Act, whether the duty of confidentiality applies to those documents and the information contained in those documents.

7.5. Text of section 21

7.6. Section 21(1) of the Act, as set out above, provides that:

> *"Subject to subsection (4), nothing in this Act compels -*
>
> *(a) the disclosure by any person of any information that the person would be entitled under any rule of law or enactment to refuse to disclose on the grounds of any privilege or any duty of confidentiality, or*
>
> *(b) the production of any document in the person's possession or power containing such information".* (Emphasis added)

7.7. The interpretation of section 21 must be read in the light of section 16(1) of the Act which provides that the Commission may do any or all of the following including:

> *"(f) direct in writing any person to –*

(i) provide the Commission with a list, verified by affidavit, disclosing all documents in the person's possession or power relating to a matter under investigation, and

(ii) specify in the affidavit any of the listed documents that the person objects to producing to the Commission and the basis for the objection."

7.8. Section 16(1)(f) is linked to section 21(6) which provides that:

> *"A person who has already provided the commission with an affidavit under section 16 (1)(f) specifying the basis for objecting to the production of a document need not provide a written statement under subsection (5)(b) of this section concerning the same document."*

7.9. Thus, section 21(1) - insofar as it provides that nothing in the Act compels disclosure of information or production of documents that a person would be entitled under any rule of law to refuse to disclose on the grounds of any duty of confidentiality - must be seen as an exception to the general power of the Commission to issue directions under section 16.

7.10. Moreover, it is an exception which itself does not provide for any qualifications.

7.11. Therefore, the words "...nothing in this Act compels..." must be given their full meaning and effect.

7.12. **Interpretation of section 21**

7.13. Whereas section 21(1) of the Act sets out the general principle that nothing in the Act compels the production of such documents, section 21(2) provides that where a person claims to be entitled under any rule of law or enactment to refuse, on the grounds of any privilege or any duty of confidentiality, to disclose any information or to produce any document, the Commission may determine whether the privilege or the duty of confidentiality applies to that information or document.

7.14. There are two possible interpretations of this subsection. These are:

(1) A narrow interpretation - i.e. the Commission may determine whether the duty of confidentiality simpliciter applies to that document; or

(2) A broad interpretation - i.e. the Commission may determine whether the duty of confidentiality under any rule of law (under which a person claims to be entitled to refuse to produce the document) applies to that document.

7.15. If the narrow interpretation of this statutory provision is correct, then the Commission has a simple determination to make: having examined the document does the duty of confidentiality apply to that document?

7.16. In the present case, the Commission, having considered all the documents and categories of documents furnished to the Commission, is of the view that the duty of confidentiality does indeed apply to these documents. This is because there is no doubt that all of these documents arise from, or are occasioned by, the banker-customer relationship and are therefore covered by the banker-customer duty of confidentiality.

7.17. The Commission, however, is of the view that the narrow interpretation of section 21(2) is not the appropriate interpretation. It would, in the Commission's view, be a strained interpretation. This is because, in the Commission's view, a proper reading of section 21(2) means that what the Commission has to determine is not whether a duty of confidentiality simpliciter applies to the document, but rather whether a duty of confidentiality as claimed under any rule of law applies to that information or document.

7.18. Thus the question then becomes: what is the rule of law under which the Special Liquidators are claiming an entitlement to refuse to produce the documents on the grounds of a duty of confidentiality?

7.19. To answer this question it is necessary to consider the Special Liquidators' own written statements and legal submissions.

7.20. **The Relevant Rule of Law**

7.21. The rule of law on which the Special Liquidators rely is the rule of law first articulated in ***Tournier v National Provision and Union Bank of England*** [1924] 1 KB 461.

7.22. The formulations on which the Special Liquidators rely are the words of Scrutton LJ who stated (at page 480) that:

> *" I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances. This duty equally applies in certain other confidential relations, such as counsel or solicitor and client, or doctor and patient."*

7.23. The Special Liquidators also rely on the formulation of Atkins LJ, who stated (at page 484) as follows:

> "*I come to the conclusion that one of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to his affairs without his consent."*

7.24. However, the classic statement of the rule (and its qualifications) is the core which appears in the judgment of Bankes LJ where he states (at page 471):

> "*At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification, and to indicate its limits... In my opinion it is necessary in a case like the present to direct the jury what are the limits, and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer.*

There appears to be no authority on the point. On principle I think that the qualifications can be classified under four heads:

(a) where disclosure is under compulsion by law;

(b) where there is the duty to the public to disclose;

(c) where the interest of the bank require disclosure;

(d) where the disclosure is made by the express or implied consent of the customer."

7.25. The Special Liquidators also rely on statements further describing or amplifying the rule of law in ***National Irish Bank v RTE***, Kelly J in ***Cooper Flynn v RTE***, ***Attorney General v The Guardian (No 2)*** and ***McKillen v The Sunday Times*** (cited above).

7.26. The Commission is of the view that the rule of law, which is referred to in section 21 must, as a matter of statutory definition, mean not only the general principle encapsulated in the rule of law, but also the relevant exceptions. In this case, the rule of law is not only the general principle of banker/customer confidentiality but also the four exceptions or qualifications set out by Bankes LJ in ***Tournier.*** This classic statement of the formulation of the rule and its four exceptions or qualifications has been accepted as authoritative by the Court of Appeal in England and Wales and has also been adopted in this jurisdiction as a correct statement of the rule of law pertaining to banker-customer confidentiality.

7.27. The Commission is therefore of the view that the appropriate rule of law is that a banker owes his customer a duty of confidentiality but that this duty of confidentiality is not unqualified and is subject to the four qualifications or exceptions set out by Bankes LJ in ***Tournier***.

7.28. The Commission is of the view, on the facts of the present case, that the first exception (where disclosure is required under compulsion of law) does not apply because, although under section 16 of the 2004 Act, a Commission has the power to make directions and thereby compel a bank to produce documents, section 21(1) provides that *"...nothing in this Act compels..."* the production of such documents where a person claims a duty of confidentiality.

7.29. The Commission has also concluded that the third exception – where the interests of the bank require disclosure – does not apply in the present case because it is the Special Liquidators who decide whether the interests of the bank require disclosure and they must be taken to be of the view that the interests of the bank do not require disclosure.

7.30. The Commission has also concluded that the fourth exception does not apply because there is no express or implied consent to the disclosure by the customer. The Commission has considered writing to the various customers of the bank to ask them to waive their right to confidentiality but it has concluded that there is no reality to this course of action. It is difficult to see any reasons why a customer would voluntarily waive a right to confidentiality (or consent to a bank waiving its duty of confidentiality) to permit a Commission of Investigation to investigate the write-off of its loan. Moreover, to carry out this exercise would likely be time-consuming, costly, wasteful and probably, ultimately futile.

7.31. The Commission also noted that one of the borrowers was a company which has now been dissolved. Under company law when a company is dissolved, its assets pass to the Minister for Finance (now the Minister for Public Expenditure and Reform) under the State Property Act 1954 (as amended). The Commission considered whether it should seek the consent of the relevant Minister to waive confidentiality in respect of this matter. However, an examination of the facility agreements with IBRC indicated that the relevant customer was not only the holding company but also the subsidiaries. Some of these subsidiaries have not been dissolved but have in fact been sold to a new purchaser. In those circumstances, the new purchaser would be unlikely to waive the right to confidentiality.

7.32. **Public Duty/Public Interest Exception**

7.33. The real issue, therefore, in relation to this matter is whether the second exception to the banker-customer duty of confidentiality applies to the documentation and information sought by the Commission (i.e. whether the duty of confidentiality owed

by a banker to its customer can be qualified by the public duty of the bank to disclose the relevant information).

7.34. However, the exception -"*where there is a duty to the public to disclose"*- has been considered and interpreted by the English and Irish courts in a number of cases. These cases have established that what this exception means is that although there is a private and a public interest in preserving the duty of banker/customer confidentiality, there may be an overriding public interest in the disclosure of that information and that the balancing of these private and public interests is a matter to be considered by the Courts on the facts and circumstances of each case.

7.35. **Assessment of Case Law**

7.36. It is important to understand the series of cases set out above and the parameters of what they did and, more importantly, did not decide.

7.37. In ***National Irish Bank v RTE*** the Court considered a scheme in which RTE alleged that the bank and its customers were engaging in a scheme of tax evasion. The Court then engaged in the exercise of balancing the private and public interest in confidentiality against the public interest in disclosure. There are, however, two points to note: firstly it was the Courts, not a Commission, which engaged in such a balancing of rights and secondly, the Court did not have to consider section 21 of the 2004 Act or an analogous provision.

7.38. In ***Haughey v Moriarty*** the Supreme Court also held that the public interest in disclosure outweighed the public (and private) interest in confidentiality. Again however, it was the Court and the Tribunal which engaged in the balancing decision, not a Commission, and neither the Court nor the Tribunal had to consider section 21 or a similar provision. Similar points also apply to the decisions in ***Redmond v Flood***, ***Caldwell v Mahon***, ***Walsh v National Irish Bank*** and ***Slattery v Friends First*** (cited above).

7.39. In ***McKillen v The Sunday Times*** the Court balanced the public (and private) interest in confidentiality with the public interest in a free press and the public

interest in matters to do with the corporate governance of IBRC and it permitted a limited amount of publication of confidential information. Again, it was the Courts which engaged in such a balancing role and it did not permit publication of all the documentation. Moreover, it did not have to consider section 21 of the Act.

7.40. Likewise in ***O'Brien v RTE*** the Court balanced the public interest and confidentiality with the public interest in the disclosure of certain information and only permitted a limited amount of information to be published. As Binchy J stated at paragraph 97:

> *"That of itself however does not entitle the public to know every detail of the affairs or operation of IBRC, and certainly not confidential information concerning its customers. The public interest is in knowing that it is properly governed and operated, and where there are any significant shortcomings in this regard, and in particular where such shortcomings may lead to significant losses, which have to be borne at the expense of the public purse, in my view the public is entitled to be informed of such matters."*

7.41. Moreover, in ***Walsh v National Irish Bank Limited*** (cited above) McKechnie J stated as follows:

> "*Where a conflict arises between the duty of confidentiality on the one hand, and a duty to disclose in the public interest on the other, the correct approach is that as set out by Kelly J in Cooper Flynn v RTE [2000] 3 IR 344 where at page 351 the learned judge stated:*
>
> *"It is therefore clear that a duty and a right of confidentiality exists between a banker and his customers. That is not to be equated with an entitlement to any form of legal privilege. The duty and right of confidentiality is not absolute and must in an appropriate case, be weighted and balanced as against countervailing rights, obligations and entitlements".*

7.42. Therefore, in each case, the Courts have engaged in a delicate balancing of public and private rights and have permitted an infringement of private rights in certain circumstances. The question therefore arises whether the Commission can engage in a similar balancing of rights.

7.43. **No Express Statutory Power to Balance Competing Interests and Rights**

7.44. The Commission is aware that if the Special Liquidators furnished confidential information to the Commission they would be infringing a customer's contractual right to confidentiality and could be liable for a breach of contract with the customer and could also be liable for the tort of breach of confidence. In addition, the Special Liquidators could also be liable for breach of a borrower's constitutional rights.

7.45. In these circumstances the question then becomes: Does the Commissions of Investigation Act 2004 give the Commission the express statutory power to vary or infringe a person's legal rights under contract and/or in tort and/or to infringe their constitutional rights? The answer to that question is, in the view of the Commission, no.

7.46. There is no doubt that there are many cases in which a court has held that the public interest in disclosure outweighs the public and private interest in confidentiality.

7.47. However, in each and every case under review, it is the Courts or a Tribunal vested with the powers, rights and privileges of a High Court judge which have undertaken this balancing of rights and interests.

7.48. The question then becomes: Does the Commission have the express legislative power to balance the private and public interest in confidentiality with the public interest in disclosure and to hold that the public interest in disclosure should prevail? The answer to that question, in the view of the Commission, is also no.

7.49. In the view of the Commission, this balancing of the public and private interests in maintaining confidentiality with the public interest in disclosure is, of necessity, an exercise which involves balancing the private contractual rights, obligations and

entitlements with the public interest in disclosure. This must, of necessity, involve a potential infringement of an individual's rights, obligations and entitlements under law.

7.50. A Commission of Investigation has no express legal or statutory power to weigh and balance "*countervailing rights, obligations and entitlements*" as Kelly J set out in ***Cooper Flynn v RTE*** [2000] 3 IR 344. Thus the Commission has no express statutory power to make a determination which might result in an infringement of a customer's contractual right to confidentiality, a customer's claim for breach of confidence and/or a customer's constitutional right to privacy. These are matters which could only be permitted if there was clear statutory language to that effect or if there was a declaration to that effect by the Courts.

7.51. The Commission is also mindful of the fact that it is a creature of statute. It is only authorised to do such acts as the statute creating it empowers it to do. It has no inherent jurisdiction. It also is not engaged in the administration of justice.

7.52. Thus, although the rule of law on banker-customer confidentiality does contain a number of exceptions, and although one of those exceptions does contain a specific reference to a public interest in disclosure, it is clear that this exception in the rule of law is, in effect, a "*balancing of rights*" exception. The balancing of rights and duties, in the Commission's view, is not a function which a Commission may undertake in the absence of clear legislative authority to that effect or a clear ruling from the Courts.

7.53. When one considers the wording of section 21(2) of the 2004 Act, it is clear that the statutory section does not contain any language which enables the Commission to determine whether, if a duty of confidentiality applies, it should be outweighed by the public interest in disclosure.

7.54. Moreover, the Commission is of the view that such language could not be implied into the statutory provision by the Commission. Such an interpretation would not withstand legal challenge.

7.55. The Special Liquidators in their supplemental legal submissions (dated 9th October 2015) stated as follows:

> *"It is important to note that none of the submissions which have been received from the former Directors of IBRC or from the Department of Finance contend that the documents in question are not confidential and indeed the Department of Finance appears to accept that the documents are confidential. The basis upon which former directors of IBRC argue that the documents should be disclosed is that notwithstanding that they are confidential, the public interest requires that they should be disclosed so that the Commission might be in a position to review them for the purpose of conducting the Inquiry and that the former Directors will be in a position to review the documents for the purpose of responding to any questions asked of them by the Commission.*
>
> *There is no doubt that a Court is empowered to consider whether documents which it considers to be confidential should, notwithstanding this confidentiality, be disclosed if it concludes that the public interest in disclosure outweighs the public interest in maintaining confidentiality. The case law referred to in the submissions of the former directors such as* ***Cooper Flynn v RTE*** *and* ***National Irish Bank Limited v RTE*** *concern decisions made by the Court as to whether the public interest required that confidentiality be maintained or that disclosure take place. However, to suggest that the Sole Member in his capacity as a member of a Commission of Investigation established under the Commissions of Investigation Act 2004 (the Act) is empowered to determine that the public interest requires the documents which it considers to be confidential should be disclosed notwithstanding this confidentiality is, to misconstrue the powers of the Sole Member as set out in the Act".*

7.56. The Commission is of the view that this submission is correct in law.

7.57. Likewise, the Special Liquidators also submitted in their supplemental legal submissions of 9th October 2015 that:

"*Section 21(1)(a) of the Act provides that nothing in the Act compels the disclosure by any person of any information that the person would be entitled under any rule of law to refuse to disclose on the grounds of a duty of confidentiality. Where such an objection is made, section 21(2) of the Act empowers the Sole Member to "determine whether the ....duty of confidentiality applies to that information or document". This provision authorises the Sole Member to determine <u>only</u> "whether.....the duty of confidentiality applies to ..... the document"*. (Emphasis added).

"...The statutory framework does not authorise the Commission to direct that a document which it considers to be confidential should be disclosed notwithstanding that it is confidential because in the Commission's view the public interest in disclosure outweighs the public interest in maintaining confidentiality. The former Directors of IBRC and the Department of Finance refer to the need to balance the public interest to maintain confidentiality as against the public interest in requiring disclosure because fair procedures require that witnesses responding to the inquiry have the opportunity to review the documents in question. However, the statutory framework does not permit the Commission to engage in such a balancing exercise and instead authorises the Commission to have regard to fair procedures by allowing a summary version only of the document to be prepared which excludes the confidential information.

Consequently, the references to the decisions of the High Court and the Supreme Court which permit a Court to direct that a document which the Court considers to be confidential should be disclosed notwithstanding its confidentiality because the public interest in allowing disclosure outweighs the public interest in maintaining confidentiality do not apply to the Sole Member in his capacity as a member of a Commission of Investigation established under the Act. The Sole Member is not exercising his jurisdiction as a Judge of the High Court and is exercising the statutory jurisdiction conferred upon him by the Act. That jurisdiction permits the

Sole Member only to carry out a determination under section 21(2) of the Act as to whether a duty of confidentiality applies to a document. Where the determination is carried out and the Sole Member determines that the document is confidential, the document may not be received as evidence and the Commission may only prepare a summary version of the document which excludes the confidential information in question if the document so allows and in the Commission's opinion it is in the interests of both the investigation and fair procedures to do so."

7.58. The Commission is of the view that this submission also is correct as a matter of law.

7.59. The directors in their legal submissions contended that even if the documents were confidential, the Commission did have the power to overrule that in the public interest and to admit the documents. However, the directors were unable to point to any specific statutory power in the 2004 Act to enable the Commission to do so.

7.60. The Department of Finance also maintained that the documents were confidential but said that the determination as to whether they could be admitted was a matter for the Commission.

7.61. The Department of Finance in their legal submissions contended that under section 16(4) of the Act the "*rules of court relating to the discovery of documents in proceedings in the Court apply with any necessary modifications in relation to the disclosure of documents under subsection (1)(f).*"

7.62. However, in the view of the Commission, that section is not sufficient to grant the Commission the relevant statutory power to conclude that the public interest in disclosure outweighs the public interest in confidentiality because firstly, section 16(4) refers to "*any necessary modifications*" one of which is certainly section 21; secondly, section 16 as a whole must be read in the light of section 21 which provides that *"...nothing in this Act compels..."* the production of confidential documents; thirdly, section 16(4) does not use similar language to that used in the Tribunal's legislation which vests tribunals with all the powers of a High Court judge in respect of decisions on discovery.

7.63. The Commission is, therefore, of the view that section 21 of the Act, when properly construed and interpreted, means that if a person asserts a duty of confidentiality then the role of the Commission is limited to examining the document and determining whether the duty of confidentiality "*applies*" to that document. The Commission has no statutory powers to engage in a balancing exercise or to infringe a person's contractual right to confidentiality.

7.64. **The Statutory Scheme Provides for a Different Mechanism**

7.65. Moreover, in addition to the fact that there is no express statutory power which grants the Commission the power to engage in such a balancing exercise, the Act in fact provides for an entirely different mechanism as to how a Commission should deal with any documents to which the duty of confidentiality applies. Thus section 21(9) provides that, if the Commission determines that the duty of confidentiality applies, the Commission may prepare a summary version of the document that excludes the confidential information if the document so allows and if in the Commission's opinion, it is in the interests of both the investigation and fair procedures to do so.

7.66. Moreover, section 21(10) provides that where a Commission causes a summary version of such a document to be prepared, then the summary version forms part of the evidence received by the Commission.

7.67. The Commission has considered whether the documents in this case "*allow*" of a summary to be prepared and whether "*it is in the interests of both the investigation and fair procedures to do so*". The view of the Commission is that the documents do not allow for the preparation of a summary and, even if they did, it is not in the interests of the investigation and/or fair procedures to prepare such a summary. This is because the Special Liquidators have not claimed a duty of confidentiality over particular documents or particular parts of particular documents. They have claimed the duty of confidentiality over every piece of information contained in the documents and over every document which they have furnished to the Commission.

7.68. Moreover, as many of these documents relate to vital information within the accounts of the customers, it is not possible to prepare a summary of the documents. The duty of confidentiality is claimed over the entire document and it is the entire document which needs to be put in evidence. In the Commission's view, therefore, section 21(9) is of no avail to the Commission.

7.69. **Any Other Interpretation would render Claims of Confidentiality Nugatory**

7.70. Moreover, the Commission also considered that if a person claimed a duty of confidentiality over any document and the Commission considered that it could override that duty of confidentiality on the grounds of public interest, then that would render any claim of confidentiality under section 21 of the 2004 Act nugatory. In other words, given that all Commissions of Investigation are established pursuant to section 3 of the Act to investigate matters of significant public concern, it would mean that all claims to confidentiality could be ineffective because the Commission could always override the claim to confidentiality by a determination that such a claim to confidentiality must yield to the public interest in the disclosure of these documents.

7.71. In the Commission's view, this would result in an interpretation of section 21 which would render all claims of confidentiality meaningless. The Commission is of the view that such an interpretation by the Commission would not withstand legal challenge.

7.72. **Comparison of Confidentiality with Privilege**

7.73. It is also of significance to consider how section 21 operates in the event of a claim to privilege. If privilege is claimed, then the Commission may examine the document to see if the privilege "*applies*" to the document. If the Commission determines that it does apply, then the document cannot be received into evidence by the Commission. Moreover, the Commission cannot compel its production under section 21(1). There is no exception to this in the Statute. Thus, there is no statutory right given to the Commission to consider whether, if privilege attaches to the document, such privilege can or should be outweighed by the public interest in disclosure. It is clear, therefore,

that the statutory section does not give the Commission a statutory power to encroach upon legal professional privilege (or indeed, any other type of privilege) and such words cannot be read into this statutory section in respect of privilege. If the Commission were to hold that legal advice privilege was outweighed by a public interest in disclosure that would result in an immediate and, in the Commission's view, successful legal challenge.

7.74. In those circumstances it is difficult to see on what legal basis the Commission could, as a matter of logic, encroach upon the duty of confidentiality but not the claim of privilege when the concepts of privilege and confidentiality are treated in an identical fashion in section 21.

7.75. **Meaning of the Phrase "May Determine"**

7.76. It could be argued that, as section 21(2) gives a statutory power to the Commission to "*determine*" whether the duty of confidentiality applies to the documents, this give the Commission the power to determine (a) whether the duty of confidentiality applies, (b) whether any of the exceptions apply, (c) whether the exception in relation to the public duty to disclose applies and therefore, (d) whether the public interest in disclosure outweighs the public interest in confidentiality.

7.77. However, in the Commission's view, the difficulty with this argument is that it bases the Commission's power to decide between competing private and public rights not on any express statutory language, but on the word "*determine*".

7.78. In the view of the Commission, to locate the statutory power of the Commission to balance competing private rights to confidentiality with public interests in disclosure exclusively in the word "*determine*" is to place a weight on the phrase "*may determine*" which the language cannot bear. It is, in the view of the Commission, a strained interpretation.

7.79. **Comparison with other statutory codes**

7.80. Moreover, when one considers alternative statutory codes, it is clear that the Legislature has, in certain cases, granted the power to certain bodies to override a duty of confidentiality in clear and unambiguous statutory language.

(a) Taxes Consolidation Act 1997

7.81. In the Taxes Consolidation Act 1997 the Revenue Commissioners have extensive statutory powers to obtain information of a customer's account from his/her banker. The legislation provides that an Inspector or another duly authorised officer of the Revenue Commissioners may apply to the High Court to obtain details of a customer's account from the bank. Thus Section 908B(2) of the Taxes Consolidation Act 1997 (as inserted by section 87 of the Finance Act 2004) provides:

> *"An authorised officer* [of the Revenue Commissioners] *may, subject to this section, make an application to a judge for an order requiring a financial institution to do either or both of the following, namely—*
> *(a) to make available for inspection by the authorised officer, such books, records or other documents as are in the power, possession or procurement of an associated institution, in relation to the financial institution, as contain, or may (in the authorised officer's opinion formed on reasonable grounds) contain information relevant to a liability in relation to a taxpayer, or*
> *(b) to furnish to the authorised officer such information, explanations and particulars held by, or available from, the financial institution or an associated institution, in relation to the financial institution, as the authorised officer may reasonably require, being information, explanations or particulars that are relevant to any such liability,*
> *and which are specified in the application."*

7.82. This provision was considered in ***Liston v G. O'C and A.O'C*** [1996] 1 IR 501. In that case, an inspector of taxes formed the view that the taxpayers maintained

accounts at AIB and Bank of Ireland likely to contain information relevant to the taxpayers' financial affairs. An order was made by the High Court requiring the banks to furnish to the Revenue Commissioners particulars of all accounts. The High Court's decision was upheld by the Supreme Court. Keane J (as he then was) in the Supreme Court stated as follows (at page 511):

> *"...the role of the inspector under the section is a purely investigative one. ...The clear object of the provision is, however, to enable the Revenue Commissioners to obtain information of this nature in order to ensure that all taxpayers pay the tax which by law they are required to pay... However, an order made under the section seriously abridges the right of confidentiality which every person dealing with a bank enjoys and it is for that reason that the Oireachtas not merely stipulated that the inspector must have reasonable grounds for his belief but provided the additional and valuable safeguard that a High Court Judge must be satisfied that such reasonable grounds exist before the institution concerned can be required to furnish the information sought."*

(b) Access to Bank Accounts by An Garda Síochána and the Director of Corporate Enforcement

7.83. Moreover, in the case of a criminal investigation, an Inspector (of an Garda Síochána) may apply to the High Court for an account information order and the High Court may make an order under section 13(3)(b) of the Criminal Justice (Mutual Assistance) Act 2008 disclosing bank accounts to the Inspector if it is satisfied that:

> *"there are reasonable grounds for believing –*
>
> *(i) that the financial institution or financial institutions concerned may have information which is required for the purposes of the investigation, and*
>
> *(ii) that it is in the public interest that any such information should be disclosed for those purposes, having regard to the benefit likely to accrue to the investigation and any other relevant circumstances.*

7.84. Moreover, section 13(5) of the same Act specifically provides that such an order takes effect "*notwithstanding any obligation as to secrecy or any other restriction on disclosure imposed by Statute or otherwise".*

(c) Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998

7.85. Another example of a statutory code which deals with confidential information is the Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998.

7.86. Section 13(1) of the said Act provides as follows:

> *"Subject to section 2(6) and subsection (2), any prohibition or restriction imposed by law (including any contract) in relation to the disclosure of information (including records in any form or documents) shall not apply in relation to the disclosure of information to or access to information by the Comptroller, or the auditor appointed under section 2, for the purposes of their functions under this Act or in relation to any information that is contained in a report of the Comptroller or such an auditor under that section and is information that in the opinion of the Comptroller, or the auditor, as the case may be, ought in the public interest to be so contained."*

7.87. Section 14(1) also provides:

> *"The Comptroller may whenever he or she thinks it appropriate or expedient to do so apply to the High Court for directions in relation to the performance of any of his or her functions under this Act or those of an auditor appointed under section 2 or for its approval of any act or omission proposed to be done or made by the Comptroller or the auditor for the purposes of such performance."*

7.88. Therefore, it is clear that the Legislature, when considering confidential banking information in other contexts (for example, with the Revenue Commissioners, the Garda Síochána and the Director of Corporate Enforcement) has set out express statutory powers for such bodies to obtain such information only on foot of orders from the High Court and on foot of various other statutory criteria.

7.89. In the view of the Commission, if the Legislature had intended the Commission to have the power to obtain customers' bank records from IBRC in such a manner as to overrule the customers' contractual rights to confidentiality such wording would have been expressly provided for within the statute. However, there is no such wording. The Commission, therefore, is of the view that it has no express statutory power within section 21 (or elsewhere within the 2004 Act) to obtain such confidential banker-customer account information, to infringe the customers' contractual rights to confidentiality and/or to balance those contractual rights to confidentiality with the public interest in disclosure.

7.90. **Contrast with the Powers of Tribunals**

7.91. In certain cases, tribunals of inquiry may balance a private right to confidentiality against a public interest in disclosure. However, this is because (i) under the Tribunals of Inquiry legislation, tribunals are vested with all the powers of a High Court judge when considering discovery applications and may, therefore, consider issues of confidentiality (and privilege) and weigh them in the balance; (ii) and most importantly, the Tribunals of Inquiries Acts do not contain a provision similar to section 21 of the 2004 Act.

7.92. Section 1 of the Tribunals of Inquiry (Evidence) Act 1921 provides that the member of the tribunal is vested with *"... all such powers, rights, and privileges as are vested in the High Court…on the occasion of an action in respect of…[t]he compelling of the production of documents."*

7.93. Section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 provides that:- "*A tribunal may make such orders as it considers necessary for the purposes of its functions, and it shall have, in relation to their making, all such powers, rights*

and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders."

7.94. In ***Murphy v Flood*** [1999] 3 IR 97 the Supreme Court referred specifically to the aforementioned provisions of the legislation which established the Flood Tribunal in holding that the sole member of the Tribunal had jurisdiction to determine whether the documents in question were privileged. Hamilton CJ, giving judgment for the Court, held (at page 103):

> *"Any person who is required by the tribunal to produce documents in his possession or procurement may claim that some or all of the documents in question are privileged. That is the claim made by the applicant in the present case. Where such a claim is made in the course of proceedings in the High Court, it must be decided by the court and, for that purpose, the court may find it necessary to examine the documents in question. <u>It is beyond argument that the provisions which I have cited similarly empower the respondent to adjudicate on any claim of privilege so made to him</u>."* [Emphasis added]

7.95. **The Statutory Instrument Establishing the Commission**

7.96. S.I. No. 253 of 2015 Commission of Investigation (Irish Bank Resolution Corporation) Order 2015 is the statutory instrument which established the Commission. It provides at paragraph 3(b) of its Schedule that:

> *"3. The report to be made by the Commission in relation to the foregoing investigations shall: ... (b) respect obligations of confidentiality and to respect commercial sensitivity where those are not incompatible with the public interest."*

7.97. The Commission has considered this provision. However, this provision is contained in a schedule to a Statutory Instrument and does not, nor does it purport to, amend section 21 of the Commissions of Investigation Act 2004. On its own, it does not give the Commission statutory power to infringe a customer's rights to

confidentiality. Moreover, it does not give the Commission the power to balance the private rights to confidentiality with the public interest in disclosure. Thus, this provision does not assist the Commission.

7.98. **Conclusion on the Assessment of the Claim of Confidentiality**

7.99. Thus when one considers the statutory scheme as a whole, it is clear that:

1. The role of the Commission is to decide whether the duty of confidentiality applies to the document in question;
2. If it does, then documents are not to be received into evidence by the Commission;
3. There is no express statutory power given to the Commission to engage in a balancing of rights exercise or to infringe a person's contractual right to confidentiality.

8. **Directions from the Court**

8.1. The Commission has also considered seeking directions from the High Court in respect of this matter but unfortunately the 2004 Act does not provide any mechanism for a Commission to seek directions from the Court in respect of such matters.

8.2. This is in contrast to a provision found in section 25 of the Commission To Inquire Into Child Abuse Act 2000 which provides at subsection (1):

> *"The Commission may, whenever it considers appropriate to do so, apply in a summary manner to the High Court sitting otherwise than in public for directions in relation to the performance of any of the functions of the Commission or a Committee or for its approval of an act or omission proposed to be done or made by the Commission or a Committee for the purposes of such performance."*

9. Assessment of the Claim of Privilege

9.1. The Special Liquidators have also claimed legal advice privilege over many of the documents which they have furnished to the Commission. In particular, there are many transactions in which it appears that the directors may have obtained legal advice in relation to the write-off of various loans to various borrowers. The Special Liquidators are claiming legal advice privilege over these documents because they say they are entitled to claim such legal advice privilege.

9.2. The ambit of legal professional privilege was described by Finlay CJ in ***Smurfit Paribas Bank Ltd v AAB Export Finance Ltd*** [1990] 1 IR 469 as follows:

> "*...where it is established that a communication was made between a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice, whether at the initiation of the client or the lawyer, that communication made on such an occasion should in general be privileged or exempt from disclosure, except with the consent of the client."*

9.3. As the Special Liquidator submit in their legal submissions on this issue:

> *"Legal professional privilege is absolute and a document that is legally privileged may never be disclosed except with the consent of the owner of the privilege, which, in the case of legal professional privilege, is the client's."*

9.4. It is not in dispute that legal professional privilege is absolute (or almost absolute) and that there are no exceptions which are relevant in this case.

9.5. The Commission has considered the documents over which legal advice privilege is claimed and it is satisfied that the legal advice privilege does indeed apply to the documents and information in question.

9.6. The Commission is also satisfied that it cannot cause to be prepared a summary version of the document which excludes the relevant information.

9.7. In the circumstances, the 2004 Act at section 21(8) provides that where the Commission determines that the privilege relied on as grounds for refusing to produce the document applies to any of the information in the document, the document is not considered to be evidence received by the Commission.

9.8. In the circumstances, the Commission is bound under the Act not to receive any of these documents into evidence.

9.9. The directors, however, submitted that, as their decisions to make certain write-offs were based in part upon legal advice which they may have received, it was essential in the interests of fair procedures and constitutional justice that they should have access to these documents so that they could properly prepare for the investigation.

9.10. As a result of these concerns, the Commission wrote to the Special Liquidators asking them to waive their claim to legal advice privilege.

9.11. The Special Liquidators in their supplemental legal submissions of 9th October 2015 stated that notwithstanding the documents were covered by legal professional privilege, they were willing to consent that the documents could be disclosed to the Sole Member solely for the purposes of allowing him to investigate the transactions the subject of the directions. However, the letter also stated:

> *"However, the Special Liquidators do not consent to the documents being provided to any third parties who are outside the Commission, such as witnesses or former Directors of IBRC or anyone else who is not the Sole Member or someone employed or instructed by him, without further consent to such disclosure being sought from the Special Liquidators."*

9.12. This offer was not acceptable to the Commission and it wrote again to the Special Liquidators on 21st October 2015 requesting them again to waive their claim of privilege. The Special Liquidators replied on 27th October 2015 stating that they

were not in a position to waive generally the claim of privilege. They stated that they could not waive privilege in cases where they were involved in on-going litigation.

9.13. This limited and conditional offer of disclosure of such documents to the Commission, but not to the directors except on a case by case basis, means that the future work of the Commission in investigating each transaction would be subject to a veto by the Special Liquidators or would be conditional upon the Special Liquidators approving the release of such legal advice documents to the directors. In the view of the Commission, this is an unacceptable restriction placed by the Special Liquidators on the future work of the Commission.

9.14. Moreover, as the Special Liquidators have refused to waive this privilege, the consequences are that the directors are deprived of their constitutional right to fair procedures and their right to be able to respond to the Commission's investigation in any meaningful way.

9.15. The Commission would, therefore, conclude that, as the privilege has been claimed by the Special Liquidators, as the documents cannot be received into evidence by the Commission and as this would result in manifestly unfair procedures to the directors, the Commission cannot proceed with its investigation until this matter is resolved.

10. Conclusions

Confidentiality

10.1. The Commission would, therefore, conclude as follows:

(i) The Special Liquidators have asserted the duty of confidentiality over approximately two hundred thousand pages of documents;

(ii) Under the Commissions of Investigation Act 2004, the Commission must examine these documents before it determines whether a duty of confidentiality applies;

(iii) The Commission has examined these documents and the Commission is of the view that the banker-customer duty of confidentiality does apply to these documents;

(iv) The Commission has also considered a broader interpretation of section 21(2). In other words, it has considered whether the duty of confidentiality contained in a rule of law applies to the documents. The Commission has concluded that the broader interpretation of section 21(2) is the correct interpretation;

(v) The rule of law under which the Special Liquidators have claimed a duty of confidentiality is the rule of law first enunciated in ***Tournier v National Provincial and Union Bank of England*** [1924] 1 KB 461 and approved subsequently in the Irish Courts;

(vi) This rule states that a banker owes a duty of confidentiality to its customers. However, that duty is not absolute. There are four specific qualifications and/exceptions. These are:

1) Where disclosure is under compulsion by law.
2) Where there is a duty to the public to disclose.

3) Where the interests of the bank require disclosure.
4) Where the disclosure is made by the express or implied consent of the customer.

(vii) The Commission has considered whether any of these four exceptions apply in the present case. However, the Commission concluded that the first exception – where disclosure is under compulsion of law – could not apply because section 21(1) of the 2004 Act provides that "*...nothing in this Act compels...*" the disclosure of confidential information or documents;

(viii) The Commission also concluded that the third exception – where the interests of the bank require disclosure – also does not apply in the present case because it is the Special Liquidators who decide whether the interests of the bank require disclosure and they must be taken to be of the view that the interests of the bank do not require disclosure;

(ix) The Commission has also concluded that the fourth exception does not apply because there is no express or implied consent to the disclosure by the customer. The Commission has considered writing to the various customers of the bank to ask them to waive this confidentiality but it has concluded that there is no reality to this course of action. It is difficult to envisage reasons why a customer would voluntarily waive a right to confidentiality or consent to a bank waiving its duty of confidentiality to permit a Commission of Investigation to investigate the write-off of certain of its loans. Moreover, to carry out this exercise would be a time consuming, costly, wasteful and ultimately futile exercise;

(x) The Commission has also considered the second exception – whether there is a duty to the public to disclose the confidential documents. This second exception has been the subject of considerable judicial comment and analysis over the years. It is clear from the case-law that in considering this exception, the Courts must engage in a balancing of private rights and public interests. There are numerous cases where the

Courts have engaged in such a balancing exercise and have weighed the private interests in confidentiality, the public interest in confidentiality and the public interest in disclosure. In many cases the Courts have held that the public interest in disclosure outweighs the private interest in confidentiality and, indeed, the public interest in confidentiality;

(xi) However, the Commission has no express statutory power under the 2004 Act to engage in a balancing exercise and to consider whether the duty of confidentiality should be outweighed by a public interest in disclosure;

(xii) Moreover, the Commission, as a creature of statute, has no inherent powers to engage in such a balancing exercise of whether the private duty of confidentiality should be outweighed by a public interest in disclosure. Without express statutory powers or a clear precedent these are matters for the Courts;

(xiii) If the Commission were to engage in this balancing exercise, it would be the subject of an immediate challenge in the Courts. The Commission is of the view that such a challenge is likely to be successful;

(xiv) Moreover, even if the Commission were granted an express statutory power to balance the private duty of confidentiality with a public interest in disclosure, a customer may still assert a constitutional right to confidentiality over their bank accounts or a constitutional right to privacy. In such circumstances, the Courts may have to determine this matter before the Commission could proceed with its investigation;

(xv) Therefore, on both a narrow and a broad interpretation of section 21(1) and (2), the Commission has concluded that the duty of confidentiality applies to the documents;

(xvi) Under the Act, the only option open to a Commission - where it is of the view that a duty of confidentiality applies to the documents - is to consider, under section 21(9) of the Act, whether the Commission could

prepare a summary version of the document which excludes the confidential information. Given that the essence of the documents is the confidential information contained therein, the Commission is of the view that the documents do not allow a summary to be made of them;

(xvii) If the duty of confidentiality applies to the documents then, under section 21(8) of the Act, the documents are not considered to be evidence received by the Commission;

(xviii) Moreover, under section 21(1) of the Act, the Commission may not compel the production of documents or the disclosure of information where those documents or information are subject to a duty of confidentiality;

(xix) Therefore, the Commission, reluctantly, is driven to the conclusion, that the duty of confidentiality applies to the documents and they may not be received into evidence by the Commission.

Privilege

10.2. The Commission would also conclude as follows in respect of the claim on privilege:

(i) The Special Liquidators have claimed legal advice privilege over many of the documents which they have furnished to the Commission;

(ii) The Commission has reviewed these documents and it is satisfied that the legal advice privilege does indeed apply to the documents and information in question;

(iii) The Commission is satisfied it cannot cause to be prepared a summary version of the documents which excludes the relevant information;

(iv) Therefore, under section 21(8) of the 2004 Act, none of these documents can be considered to be evidence received by the Commission.

Signed: _____

The Hon. Mr. Justice Brian Cregan

Sole Member